No. 14,752

IN THE

United States Court of Appeals

For the Ninth Circuit

AZ DIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

DUARD F. GEIS,
Willows, California,
PIERCE & BROWN,
FRED PIERCE,
BENJAMIN H. BROWN,
1023 H Street, Sacramento, California,
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

No. 14,752

IN THE

United States Court of Appeals

For the Ninth Circuit

AZ DIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Walter L. Pope, and Dal M. Lemmon, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Az Din, the defendant-appellant above named presents this, his petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

That the grounds of said petition are as follows:

I. If the rule respecting the inadmissibility in Federal Courts by evidence procured by state agents illegally has been changed, failure to move in the trial Court to suppress the evidence or to object to its

introduction does not preclude appellant from relief on appeal.

(a) The point that the conviction was obtained by evidence procured by a state narcotic agent and two deputy sheriffs by an illegal search and seizure was made by appellant in his reply brief p. 13 et seq.

(b) In its opinion the Court has stated that the point cannot be maintained because:

1. "No motion was made to suppress this evidence . . ."(p. 2.)

(c) In answer to this we respectfully contend that the rule is that if at the time the illegally obtained evidence is admitted no objection or motion to suppress is made, the evidence being admissible as the law stood at the time of the trial, the appellant is not precluded from raising the objection on appeal if the rule relating to the admissibility of the evidence is changed after the trial.

The reasoning: A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendant might hope that an established rule of evidence would be changed on appeal. Moreover, an objection being futile "the law neither does nor requires idle acts."

People v. Kitchens (Feb. 1956), 46 A.C. 257, ... P. 2d ..... (citing the following Federal cases:

Gros v. United States, 136 F. 2d 878;

Runnels v. United States, 138 F. 2d 346;

United States v. Haupt, 136 F. 2d 661;
Gambino v. United States, 274 U.S. 310, 48 S. Ct. 137, 72 L.Ed. 293;
Clyatt v. United States, 197 U.S. 207, 221-222, 25 S.Ct. 429, 49 L.Ed. 726;
Wyberg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 41 L.Ed. 289.)

II. The opinion in the instant case further answers the "illegal search and seizure argument" by stating "The search and seizure was by state officers." (p. 2.) Although the United States has not yet categorically adopted the rule that evidence illegally seized by state officers cannot be used in Federal cases, the question:

(a) was left open by the majority opinion of Mr. Justice Frankfurter in *Lustig v. United States,* 338 U.S. 74, 93 L.Ed. 1819, saying (on p. 1833 of L.Ed.) *"it is not necessary to consider what would be the result if the search had been conducted entirely by State officers".** The following language from the majority opinion is also to be noted:

> "It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with a view to its use in a federal prosecution or the federal agent himself takes the articles out of a bag."

(b) The concurring opinion in the *Lustig* case of Mr. Justice Murphy with whom Mr. Justice Douglas

*Emphasis ours throughout.

and Mr. Justice Rutledge joined are further indicative of the establishment of a new rule (on p. 1824 of L.Ed.):

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

Mr. Justice Black also concurring with the majority opinion, indicated that his views are the same.

(c) The trend of judicial thinking in the United States Supreme Court is also indicated by:

(c-1) *Wolf v. Colorado,* 338 U.S. 25, 93 L.Ed. 1792, 69 S.Ct. 1359 (both the concurring and the dissenting opinion of Mr. Justice Murphy) and

(c-2) the majority opinion of Mr. Justice Douglas, concurred in by Chief Justice Warren, and Associate Justices Black, Frankfurter and Clark in *Rea v. United States* (January 1956), 100 L.Ed. 213, holding that the policy of Federal Rules of Criminal Procedure governing searches and seizures would be defeated if a federal officer could use the fruits of an unlawful search either in federal or state proceedings.

(d) There is persuasive reasoning in the holding of the Supreme Court of California (per Justice Traynor) in *People v. Cahan* (April 1955), 44 C. 2d 434, 282 P. 2d 905. Since this case if the United States Supreme Court would hold contrary to the rule here contended for it would result in the following anomaly:

(d-1) That evidence illegally obtained by a federal agent and sought to be used in a Federal Court would violate the Fourth Amendment;

(d-2) That evidence illegally obtained by a state or federal agent and sought to be used in the State Court (of California) would violate the Fourteenth Amendment;

(d-3) That the United States District Court would enjoin the attempted use by a federal agent in a State Court of evidence illegally obtained by the federal agent as a violation of the Federal Rules of Criminal Procedure (the *Rea* case); but

(d-4) that evidence illegally obtained by a state agent could be used in a Federal Court.

It is submitted that whenever a state has decreed that use of evidence illegally seized by a state officer is inadmissible in the Courts of that state as violating the Fourteenth Amendment (as has been decreed in *People v. Cahan,* supra) the same rule should be applied in the United States Courts with reference to the same evidence, under the Fourth Amendment.

III. The opinion states: "It is not shown that they (i.e. the state officers) did not have a search warrant. We respectfully submit that it sufficiently appears that the evidence here was illegally obtained as the result of an illegal search.

(a) The record in this case does not expressly show that the state and county agents who searched the appellant's house had a search warrant but from the fact that none of the agents who purported to

describe all of the events preceding the search mentioned such a warrant (deputy sheriff Crawford's testimony was particularly complete in this regard Tr. p. 37) the reasonable inference is that no search warrant was obtained.

(b) The witness Crawford stated that Inspector House "asked permissioin to come into the house" thus also inferring that there was no search warrant—had there been one no permission would have been sought. (Tr. p. 37.)

(b-1) However, there is no evidence that permission was obtained. The person of whom permission was sought was never connected in any way with the appellant who was not present.

(c) Similar evidence, or lack of it, was held "to support the conclusion that the search and seizure at the time of the defendant's arrest was unlawful."

People v. Kitchen, 46 A.C. 257 at p. 260.

IV. In the interests of justice, if the Court holds that the record of an illegal search is not sufficiently clear to justify a reversal, the case should be remanded to take evidence.

(a) If the rule of the California Supreme Court in *People v. Kitchen,* supra and the federal cases there cited is sound then the appellant should not be penalized on appeal from raising the question of the illegal search and seizure.

(b) Appellant contends that the decisions reviewed under "II" above indicate that the views of the Supreme Court on the question involved have changed

to such an extent that the former federal rule can no longer be said to be settled.

(c) If this Court however deems that it *is* bound by the earlier holdings of the United States Supreme Court then application for a writ of certiorari should be made so that the Supreme Court can rule on the question.

(d) To facilitate this, if there is any question about the factual situation, the case should be remanded so that evidence can be taken and the proof established that:

(d-1) There was no search warrant;

(d-2) The search and seizure was without permission.

(e) This Court has power to remand. The power is inherent and is also referrable to Rule 33, Federal Rules of Criminal Procedure.

"A case will be remanded for further evidence, or for further proofs, where the interests of justice appear to require it." 3 Am. Jur. §1211, page 713; *Hammond v. Farina Bus Line & Transp. Co.,* 275 U.S. 173, 72 L.Ed. 222, 48 S.Ct. 70; *United States v. Rio Grande Dam & Irrig. Co.,* 184 U.S. 416, 46 L.Ed. 619, 22 S.Ct. 428.

For cases collected under said Rule 33 see U.S.C.A. Title 18, Rule 33, note 38.

V. Without having further argument to make, or authorities to add, to the previous briefs, appellant asks as a further ground of reversal and rehearing that this Court reconsider its holding that the state-

ment of the United States attorney: "it would seem to me that he would make use of the narcotic in the plant rather than the seed" was cured by the Court's instruction.

(a) It is submitted that no instruction could have cured the impression put into the jury's mind by this statement;

(b) that it was aggravated by repetition of the United States attorney on page 98 inferring that the purposes for which these poppies were being grown was the production of opium and the illicit encouragement of the use of heroin. (See Appellant's Opening Brief, p. 18.)

(c) that both the jury and the trial Court must have so considered this case seems evident from the fact that the verdict was returned on all counts, and the sentence imposed upon appellant.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Dated, Sacramento, California,
March 28, 1956.

DUARD F. GEIS,
PIERCE & BROWN,
FRED PIERCE,
BENJAMIN H. BROWN,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento, California,
March 28, 1956.

Fred Pierce,
Of Counsel for Appellant and Petitioner.